HIGH COURT OF AUSTRALIA

GLEESON CJ,
KIRBY, HAYNE, CALLINAN AND CRENNAN JJ

MATTHEW DAVID BOUNDS APPELLANT

AND

THE QUEEN RESPONDENT

Bounds v The Queen
[2006] HCA 39
20 July 2006
P54/2005

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation

I L K Marshall with P G Giudice for the appellant (instructed by Moss & Co)

K P Bates with L M Fox for the respondent (instructed by Director of Public Prosecutions for Western Australia)

CATCHWORDS

Bounds v The Queen

Criminal Law – Appeal against conviction – Miscarriage of justice – Appellant presented in District Court on an indictment charging two offences – The first count, possession of child pornography, alleged an indictable offence – The second count, possession of indecent or obscene articles, was a simple offence only and was wrongly joined in the indictment – No objection taken to the indictment at the appellant's trial – Whether there was a substantial miscarriage of justice because of the wrongful joinder of count two – Whether the conviction on count one should be quashed because the jury had before it evidence on count two which, but for the wrongful joinder of count two, would not have been admissible – Whether the whole indictment was a nullity.

Words and phrases – "indictable offence", "simple offence", "substantial miscarriage of justice".

Censorship Act 1996 (WA).
Criminal Code (WA), ss 3, 689(1).
District Court of Western Australia Act 1969 (WA), ss 8, 42.

1 GLEESON CJ, HAYNE, CALLINAN AND CRENNAN JJ. On 28 May 2003, the appellant was presented in the District Court of Western Australia on an indictment charging two offences. The first count alleged that on 28 July 2001 he had in his possession child pornography, in the form of computer data. The second alleged that on the same date he had in his possession indecent or obscene articles, again in the form of computer data.

2 The first count alleged an offence under s 60(4) of the *Censorship Act* 1996 (WA) ("the Censorship Act") which, in 2001, provided:

> "A person who possesses or copies child pornography is guilty of a crime, and is liable to imprisonment for 5 years."

Because s 60(4) identified the offence as "a crime", it created an indictable offence[1].

3 The second count alleged an offence under s 59(5) and (8) of the Censorship Act which, in 2001, provided:

> "(5) A person must not possess or copy an indecent or obscene article.
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> ...
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> (8) A person who contravenes subsection ... (5) ... commits an offence and is liable to a penalty of –
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> (a) in the case of an individual, $5 000 or imprisonment for 6 months;
>
> (b) in any other case, $25 000."

Not being designated as a "crime" or "misdemeanour", this was a "simple offence"[2].

4 The Censorship Act was amended in 2003 and, in particular, the penalty provided by s 59(8) was amended[3] to provide only a monetary penalty of $5,000.

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1 *Interpretation Act* 1984 (WA), s 67; *The Criminal Code* (WA), s 3.

2 *Interpretation Act*, s 67; *The Criminal Code*, s 3.

3 *Censorship Amendment Act* 2003 (WA), s 41(1).

The amendments came into force on 1 July 2003, two weeks before the appellant was sentenced. Although it was not suggested in this Court, or in the courts below, that the appellant's liability in respect of the matters alleged in the second count (concerning the possession of indecent or obscene articles) was to be determined otherwise than in accordance with the provisions of the legislation as it stood at the time of the alleged offending, this would appear not to take account of s 37(1)(e) of the *Interpretation Act* 1984 (WA) and s 10 of the *Sentencing Act* 1995 (WA). On their face those provisions appear to require that the appellant should have been sentenced on the basis that the lesser statutory penalty provided by the Censorship Act as amended applied. These matters not having been argued, and, as will shortly be explained, the appellant's conviction and sentence on count 2 not being in issue in this Court, the point need not be pursued further.

5 In the District Court the appellant made no challenge to the indictment presented against him. He pleaded not guilty to both counts but was convicted and sentenced to a term of imprisonment on each count, suspended, in each case, for a period of 24 months pursuant to s 76 of the *Sentencing Act*.

6 The appellant appealed to the Court of Criminal Appeal of Western Australia against his convictions. For present purposes it is necessary to notice only two of the grounds of appeal to that Court. The appellant alleged that the conviction and sentence on count 2 (alleging possession of indecent or obscene articles) should be quashed because an offence under s 59(5) of the Censorship Act is not an indictable offence "and ought not be tried upon an indictment". He further alleged that the verdict of the jury on count 1 "was unsafe and unsatisfactory as ... evidence concerning [c]ount 2 was wrongly put before the jury".

7 The Court of Criminal Appeal (Murray, Steytler and McKechnie JJ) held[4] that the conviction on count 2 should be quashed. The members of the Court expressed this conclusion in different ways. Murray J held[5] that "as a matter of law this offence [count 2] was not triable on indictment and the conviction of it by the verdict of the jury was not open". Steytler J held[6] that "the indictment was

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4 *Bounds v The Queen* [2005] WASCA 1 at [3] per Murray J, [45] per Steytler J, [134] per McKechnie J.

5 [2005] WASCA 1 at [3].

6 [2005] WASCA 1 at [45].

a nullity, insofar as count 2 is concerned, and that the District Court did not have the necessary jurisdiction to embark upon a trial of that count, regardless of the appellant's failure to take the point prior to entering his plea of not guilty". McKechnie J concluded[7] that the Supreme Court and District Court "have exclusive jurisdiction over indictable offences [and] Courts of Petty Session have exclusive jurisdiction over summary offences except where, in limited circumstances, a statute expressly extends the jurisdiction of superior courts to summary offences". McKechnie J held that there was no express extension of jurisdiction engaged in this matter.

8 The Court further held, by majority (Murray and Steytler JJ, McKechnie J dissenting), that the admission of evidence relating to count 2 had occasioned no substantial miscarriage of justice in relation to count 1. Accordingly, the Court ordered that the appellant's conviction on count 2 of the indictment be quashed but made no order affecting the appellant's conviction on count 1. No consequential order quashing the sentence imposed on the appellant in respect of count 2 was pronounced, but on the argument of the appeal to this Court it was accepted that the quashing of the conviction was to be taken as extending to quashing the sentence imposed.

9 By special leave, the appellant now appeals to this Court, contending that the Court of Criminal Appeal should have quashed his conviction on count 1 (the count alleging possession of child pornography) and ordered a new trial. The contention was put in a number of ways but, in essence, all sought to contend that the jury had before it evidence which related to count 2 which, but for the joinder of that count in the indictment, would not have been admissible on a trial in respect only of count 1.

10 The respondent in this Court did not contend that the Court of Criminal Appeal erred in quashing the conviction on count 2. There was, therefore, no examination of the difficult questions presented by that Court's conclusion that the indictment should be treated as, in part, a "nullity", despite the provision then found in s 590 of *The Criminal Code* (WA) that "[e]very objection to an indictment for any defect apparent on its face must be taken by motion to quash the indictment *before the jury is sworn, and not afterwards*" (emphasis added) and the availability of a plea[8] that the Court has no jurisdiction to try the accused for the offence. In that regard, there seems little reason to think that the

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7 [2005] WASCA 1 at [98].

8 *The Criminal Code*, s 616(7).

criticisms made in the context of administrative law of the difficulties associated with terms like "void", "voidable" and "nullity"[9] are of any less force in the present context. Neither party making any submission to the contrary, however, the present appeal must be determined on the basis that the Court of Criminal Appeal's decision to quash the conviction on count 2 is not in issue.

11 At the hearing of the appeal to this Court, the appellant sought leave to amend his notice of appeal to allege, in effect, that because count 2 alleged an offence in respect of which the District Court had no jurisdiction, the *whole* indictment should be treated as a "nullity". The proposed ground has insufficient merit to warrant granting the leave that is sought. The leave sought should be refused. It is enough to say of the contention that there is no doubt that the District Court had jurisdiction to deal with the offence alleged in count 1 (the count alleging possession of child pornography). That count alleged an indictable offence. Joinder of a further count, which the parties now agree should not have been joined, would, no doubt, have grounded an application to quash the indictment in so far as it alleged that second count. But in so far as the indictment charged the appellant with an indictable offence, the indictment regularly invoked the jurisdiction of the District Court and, to that extent at least, the appellant's plea of not guilty required[10] trial of the issues raised by the plea by a jury, subject to the accused making no election pursuant to Ch LXIVA of *The Criminal Code* for trial by judge alone.

12 No objection having been taken to the indictment at the appellant's trial, there was, at trial, no "wrong decision of any question of law" within the meaning of the provision of *The Criminal Code* (s 689(1)) regulating the determination of appeals against conviction by the Court of Criminal Appeal. Nor was it submitted that the verdict of the jury on count 1 should be set aside on the ground that "it is unreasonable or cannot be supported having regard to the evidence"[11] that was led at trial. Rather, the implicit assumption underpinning the appellant's contentions about his conviction on count 1 was that there was a miscarriage of justice because of the wrongful joinder of count 2.

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9 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; Wade, "Unlawful Administrative Action: Void or Voidable?", (1967) 83 *Law Quarterly Review* 499 and (1968) 84 *Law Quarterly Review* 95; Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004) at 618-626.

10 *The Criminal Code*, s 622.

11 *The Criminal Code*, s 689(1).

13 Reference was made in argument of the appeal to this Court to what was said in the joint reasons of Brennan, Dawson and Toohey JJ in *Wilde v The Queen*[12] that "where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings" the proviso to the common form criminal appeal statute has no application. The appellant contended that count 2 having been wrongly joined in the indictment and tried at the same time as count 1, there had been such a "radical or fundamental" error that the proviso had no application. It is not necessary to decide what was meant in the joint reasons in *Wilde* by reference to "such a departure from the essential requirements of the law that it goes to the root of the proceedings" or what it is that would set some errors apart from others as "radical or fundamental". That is not necessary because the focus of the present appeal is, and must be, upon the appellant's trial in respect of count 1. It is not in issue in this Court that he should not have been tried in the District Court in respect of count 2. In considering the trial of the issues arising on count 1 it is necessary[13] to focus upon what happened at the appellant's trial in order to decide whether "no substantial miscarriage of justice has actually occurred".

14 Two particular aspects of the course of the appellant's trial are to be noted. First, the prosecution opened the case to the jury on the basis that the appellant would admit, and trial counsel for the appellant did admit, that the material the subject of count 1 met the Censorship Act definition of "child pornography", and that the material the subject of count 2 met that Act's definition of "indecent and obscene article". The consequence of these admissions was that none of the images which were the subject of either count on the indictment was put in evidence. The jury was told nothing of what those images depicted beyond what was conveyed by their description, in the case of count 1 as "child pornography", and in the case of count 2 as "indecent and obscene" images – "three bestiality images" and images of women urinating. The second matter to be noticed about the course of the appellant's trial is that the case against him revealed in the evidence was overwhelming.

15 At the time of the alleged offences the appellant was enrolled at Curtin University. At that time he lived in Esperance. Curtin University, with the local senior high school and the local shire, operated a computer laboratory at Esperance Community College. Curtin University students could, and the appellant did, have access to this computer laboratory out of hours. Access was

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12 (1988) 164 CLR 365 at 373.

13 *Weiss v The Queen* (2005) 80 ALJR 444; 223 ALR 662.

obtained to the laboratory, out of hours, by using a swipe card and a personal identification number. A student using the computers in the computer laboratory could save information to a home directory on the computer system to which only that student, and the computer system administrators, would have access. A student would obtain access to the student's home directory by entering a user name (comprising the first seven letters of the student's family name and the student's first initial) and the student's own password.

16 The images that were the subject of the two charges were found on the appellant's home directory. Most of the images were found in a folder which the appellant had called "Countach for Animation\A23, Pshcology notes" but some was found in a folder on his home directory entitled "Some Stuff".

17 Computer records tendered at trial revealed when the appellant's swipe card and personal identification number had been used to gain access out of hours to the computer laboratory. Computer records also revealed when the offending images had been downloaded onto the appellant's home directory. Some were downloaded late at night or in the early hours of the morning. All of the images the subject of the two counts had been downloaded when the appellant's swipe card and personal identification number had been used to gain access to the computer laboratory out of hours.

18 The appellant did not dispute that he had been in the computer laboratory at the times shown by the records of out of hours entry. He did not suggest that he had given his swipe card or personal identification number to any other person. Thus the undisputed evidence at the appellant's trial was that all the offending images had been downloaded when he was in the computer laboratory. Further, the undisputed evidence showed that all the offending images had been downloaded onto the appellant's home directory, a directory to which a person other than the system administrators could gain access only by using the appellant's user name and the password which the appellant had devised. It was not suggested that a system administrator had downloaded the offending images.

19 Towards the end of July 2001, a computer system administrator encountered difficulties in creating back-up tapes of the data stored in the system. On examining the home directories of the users who were storing the most data on the system, the system administrator, Mr Jones, discovered that the appellant's home directory contained a number of image files, four of which he examined and appeared to him to depict child pornography. On 30 July the University disabled the appellant's access to the system. On the same day the appellant asked why he could not gain access to the computer. He was given a letter asking him to meet the then acting program manager for the University at Esperance (Ms Michalanney).

20 On 1 August the appellant met Ms Michalanney and Mr Jones. The notes which Mr Jones took at the meeting were tendered in evidence. They recorded that Ms Michalanney had "explained to [the appellant] about him having porn/child porn" on his home directory. The notes went on: "he admitted it by nodding head & muttering". They concluded:

> "When he was leaving said he wanted to make it clear it wasn't for himself – he wasn't like that, that he was only doing it for money – both [Ms Michalanney] and myself stopped him from saying any more – he seemed so calm & collected throughout."

21 The appellant denied that he had downloaded the offending images. The computer records tendered in evidence showed that five of the 105 child pornography images were downloaded on 28 July 2001. (All of the images the subject of both counts were downloaded between 1 and 28 July 2001.) Although he denied downloading the offending images, the appellant said in evidence that on 28 July he had received some images from a person with whom he was communicating on line in a computer chat room. He said he thought that the images he received were pictures of a well-known band, called "Metallica", that he had been discussing with this person, but that he had not looked at the images that were sent to him before his access to the computer was denied on 30 July. He said that he intended to use the pictures of the band to frame and sell at a local market.

22 Mr Jones, the system administrator, had earlier given evidence that to save an image in a particular folder (as all the offending images had been) "[you] ... actually have to see the thing to be able to say, 'Go and save this in that position'". This evidence was not challenged and would appear to be distinctly at odds with the account which the appellant gave in evidence of saving files which he thought were pictures of a band without seeing the images. But the evidence given by Mr Jones on this subject was not put to the appellant in cross-examination and the prosecution sought to make no point about it at the appellant's trial.

23 Two other aspects of the evidence given at the trial should be mentioned. First, on 23 February 2001, very soon after the commencement of the appellant's first semester as an enrolled student, and before he had been issued with a swipe card enabling out of hours access to the computer laboratory, a word document was saved to his home directory which contained a list of web page addresses. Some of the addresses had names suggesting that indecent material was available there. Although the document was created at 5.23 pm, after the laboratory would ordinarily have closed (at 5.00 pm), students who had entered the laboratory during ordinary hours could remain after the laboratory had closed.

24 The second aspect of the evidence to mention concerned a movie file saved to the appellant's home directory on the day the appellant's access to the computer system was terminated. The file was not the subject of either count on the indictment. With the consent of trial counsel for the appellant evidence was tendered that this file (a file described as depicting bestiality) was saved to the appellant's home directory and was saved at 11.19 am on that day. The saving of this file at that time was said, by the appellant's trial counsel, to support the possibility that someone other than the appellant had saved the offending material to his home directory because, so it was submitted, there was evidence from the appellant and from the system administrator, Mr Jones, from which the jury might conclude that the appellant's access to the computer had been terminated by 10.30 am or 11.00 am.

25 The possibility that someone other than the appellant had saved the offending material to his home directory was said to be the greater when it was recognised, first, that the appellant's user name was fixed by the University according to a well known and readily applied system and, second, that the password the appellant used was, or at least was based on, the name of a band in which he played and which he advertised to other students. (The band was called "Gutrench" and the appellant used as his password either "Gutrench" or, when required by the system to reset the password, as users were required to do every 90 days, "Gutrench 1".)

26 As noted earlier, the appellant's complaint about the effect of the wrongful joinder of count 2 was that it had led to the jury having before it a deal of evidence which would not have been admissible had the trial been confined to a trial of the issues raised by count 1. The evidence admitted at the appellant's trial about the downloading of the images the subject of count 2 was very limited. It would have been admissible on the trial of an indictment alleging only count 1. The evidence about downloading the images the subject of count 2 was confined to evidence showing that certain named files were stored in the appellant's home directory and that those files had been downloaded when the appellant was in the computer laboratory. That evidence was relevant to whether the appellant had downloaded the 105 images of child pornography found on his home directory. The description given on a few occasions in the course of the trial of the 11 files the subject of count 2 (as indecent or obscene and as files showing images of bestiality and of women urinating) was of little moment in the context of the appellant's trial. It would have been of no greater moment in the context of a trial focused only upon possession of 105 images of child pornography and would not have supported an application for exclusion of *that* evidence as being of greater prejudicial than probative effect.

27 Particular complaint was made about the leading of evidence, by consent, about the downloading of a movie file on 30 July. It was said that the evidence was wrongly admitted and that no competent counsel could have consented to its admission in a trial confined to count 1. The argument advanced at trial about what this evidence showed depended upon the jury attributing a degree of accuracy to the estimates of time given in evidence greater than the witnesses who gave the estimates claimed. But be this as it may, the argument was advanced as an answer to both counts, not just count 1. The evidence being led by consent, there can be no question of it being wrongly admitted at the appellant's trial. Contrary to the appellant's contention, it would have been well open to competent counsel to consent to the leading of the evidence in a trial on an indictment alleging only count 1 for the argument that was founded on the evidence was advanced in answer to both counts. Leading the evidence about this file occasioned no miscarriage of justice.

28 In her final address to the jury, trial counsel for the appellant submitted that, although the jury might find that the appellant possessed the images, it could not be satisfied beyond reasonable doubt that he knew the nature of the images that had been downloaded.

29 Even without the evidence given of the appellant's conduct and statements made to Ms Michalanney and Mr Jones on 1 August, the case against him was overwhelming. In his evidence the appellant made some very speculative suggestions about who else may have downloaded the offending images. Taken as a whole, however, the evidence identified no person who could have stored, or had reason to store, these images in the appellant's personal directory. He accepted that he was in the computer laboratory when they were downloaded.

30 Of course it was theoretically possible that someone could have guessed his password and it was very easy to work out what would be his user name on the computer system. But the coincidence of his presence in the computer laboratory when all the offending images were downloaded was not to be explained away by the possibility that someone else gained access to his home directory only when he was in the laboratory, out of hours, and often alone. His conduct and statements on 1 August could only exclude any residue of doubt about his guilt. There was no substantial miscarriage of justice.

31 The appeal should be dismissed.

32 KIRBY J. This is yet another appeal concerned, ultimately, with the 'proviso' governing the disposition of criminal appeals. The appeal comes from a divided decision of the Supreme Court of Western Australia (Court of Criminal Appeal)[14]. In that Court it was found that most of the grounds of appeal relied on by Mr Matthew Bounds ("the appellant") were without substance. However, the Court unanimously concluded that the appellant had been invalidly charged on indictment, and convicted, of a non-indictable offence contained in count 2 of the indictment[15]. On this basis, the appeal against the appellant's conviction on that count was allowed. That conviction was quashed.

33 The Court of Criminal Appeal divided on what should then happen to the conviction on count 1. A majority (Murray J[16] and Steytler J[17]) concluded that the conviction on that count was valid; that it should stand; and that the appeal should otherwise be dismissed. The dissenting judge (McKechnie J[18]) decided that the circumstances required the setting aside of the conviction on count 1, with an order for a retrial limited to that count.

34 The dissenting judge was correct. This was not a case where the appellant's conviction, based on the jury's verdict in answer to the first count of the indictment, could be sustained by invoking the 'proviso'[19], as then in force in Western Australia[20]. As the dissenting judge held, the mistaken inclusion of count 2 in the indictment, and the trial of the appellant on that count, involved a fundamental flaw in the conduct of the trial[21]. In the circumstances, this meant that the appellant's trial departed from law in a basic respect. The hypothesis upon which the 'proviso' operates was thus negated. It could not save the trial outcome. Alternatively, putting the appellant on trial on the second count subjected him to an unnecessary trial to that extent; involved him in important forensic disadvantages in a trial conducted on both counts; exposed him to additional prejudice that might have contaminated the jury's reasoning; and led to

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14 *Bounds v The Queen* [2005] WASCA 1.

15 [2005] WASCA 1 at [12] per Murray J, [30]-[45] per Steytler J, [128] per McKechnie J.

16 [2005] WASCA 1 at [12].

17 [2005] WASCA 1 at [50].

18 [2005] WASCA 1 at [132]-[134].

19 *Criminal Code* (WA), s 689(1) (since repealed).

20 See now *Criminal Appeals Act* 2004 (WA), s 30(4).

21 *Wilde v The Queen* (1988) 164 CLR 365 at 373, cited [2005] WASCA 1 at [130].

the imposition of punishment, based on the jury's verdicts of guilty on both counts. It thus occasioned a substantial miscarriage of justice.

35 The last point illustrates, at the outset, the unsatisfactory features of merely severing the second count and treating the appellant's trial as having been validly conducted on the first. The trial judge's remarks on sentencing make it clear that he sentenced the appellant on the basis of his conviction on each of the two counts on which the jury returned their guilty verdicts. Thus, he sentenced the appellant to 18 months' imprisonment on count 1 and to six months' imprisonment on count 2. After some notional remarks of what he would have done if the two terms of imprisonment were to be served immediately, the trial judge directed that "the two terms of imprisonment be suspended for the maximum period of 24 months"[22]. Obviously, the reference to 24 months related to the aggregate of the primary sentences on both counts.

36 The Court of Criminal Appeal did not set aside so much of the sentence imposed on the appellant by the trial judge as related to count 2. To the extent that the order of the Court of Criminal Appeal is confirmed by this Court, so is that component of the appellant's sentence. There was no separate appeal against sentence, either in the Court below or in this Court. The 24 months suspended sentence has long since expired without the appellant's re-offending so as to revive the custodial sentence.

37 The aggregate sentence imposed by the trial judge was (if I may say so) eminently sensible on the premises on which it was based. However, the outcome of the proceedings is now scarcely logical. The sentence on the second count was never quashed or varied. Nor was the appellant's notional custodial sentence on count 2 (which remains on his criminal record) reduced or varied. As will be shown, this is but one of many difficulties that results from the initial error of the prosecutor in presenting the appellant for trial on an indictment that included count 2.

38 It was to test the consequences of the erroneous inclusion of count 2 on the indictment, and to resolve the differences that had arisen in the Court of Criminal Appeal, that the appellant was granted special leave to appeal to this Court.

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22 Pursuant to *Sentencing Act* 1995 (WA), s 76. See remarks on sentencing of Muller DCJ, *R v Bounds*, unreported, District Court of Western Australia, 15 July 2003 at 216.

The facts and legislation

39 *The facts*: The indictment found by the prosecutor against the appellant was signed on 28 May 2003 by a "Consultant Crown Prosecutor". This was purportedly done pursuant to the *Criminal Code* (WA) ("the Code") and the Criminal Procedure Rules (WA). The first count charged the appellant that on 28 July 2001 at Esperance he "had in his possession child pornography, in the form of computer data". The marginal note referred to the *Censorship Act* 1996 (WA), s 60(4). The second count charged him "[f]urther that on the same date and at the same place [he] had in his possession indecent or obscene articles, in the form of computer data". The marginal note referred to the *Censorship Act*, s 59(5).

40 The facts leading to the presentation of the indictment in the District Court of Western Australia, putting the appellant on trial on the foregoing charges, are set out in the reasons of Gleeson CJ, Hayne, Callinan and Crennan JJ ("the joint reasons"[23]). Also described there are some features of the conduct of the trial; the disposition of the appeal in the Court of Criminal Appeal[24] and the course of argument before this Court[25].

41 The case presented against the appellant, to establish his guilt of the offence charged in count 1, was extremely strong. In effect, the challenge raised in the Court of Criminal Appeal, and now in this Court, is a technical one; although not entirely so. Technical arguments are no worse for that description if they are well founded in law. Especially so in criminal trials where liberty and reputation are at stake and where these values are commonly protected by insistence on adherence to statutory procedures.

42 Reviewing the trial of the appellant as best one can do on the written record, one might indeed conclude that the evidence against him on count 1 was "overwhelming"[26]. However, even persons facing charges supported by "overwhelming" evidence are, according to our law, entitled to a trial that conforms to law in essential respects. This is what the appellant complains was missing in his case. At the time of the offences charged, he was 20 years of age and an affiliated university student[27]. Clearly, his conviction on count 1, will

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23 Joint reasons at [1]-[5].

24 Joint reasons at [6]-[8], [14].

25 Joint reasons at [9]-[13].

26 Joint reasons at [29].

27 [2005] WASCA 1 at [52].

have serious consequences for his reputation, employment, international travel and future life. These considerations reinforce the importance of ensuring a trial that conforms to law. This means, so far as count 1 was concerned, a trial before a jury uncomplicated by extraneous and legally impermissible considerations.

43 *The legislation*: The most important legislation in this appeal is that in which the 'proviso' is stated, as then applicable. Relevantly, at the time of the Court of Criminal Appeal's disposition, s 689(1) of the Code stated:

> "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal, if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
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> > Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

44 Before this Court, the prosecution accepted that the analysis of the legislation of Western Australia, contained in the reasons of McKechnie J[28], was correct. According to that analysis, the District Court of Western Australia, in which the appellant's trial took place, secures its criminal jurisdiction by virtue of ss 8 and 42 of the *District Court of Western Australia Act* 1969 (WA). Neither the District Court nor the Supreme Court is granted general jurisdiction over matters triable summarily. Such jurisdiction is conferred upon the Courts of Petty Sessions pursuant to s 20 of the *Justices Act* 1902 (WA)[29]. By the operation of these statutes, read with the provisions of s 67[30] of the *Interpretation Act* 1984 (WA), in the words of McKechnie J[31]:

> "the jurisdictional scheme becomes quite clear. Superior courts have exclusive jurisdiction over indictable offences. Courts of Petty Session have exclusive jurisdiction over summary offences except where, in

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28 [2005] WASCA 1 at [91]-[123].

29 [2005] WASCA 1 at [96]-[98].

30 [2005] WASCA 1 at [99].

31 [2005] WASCA 1 at [98]. See also at [36] per Steytler J.

> limited circumstances, a statute expressly extends the jurisdiction of superior courts to summary offences."

45 At the time of the trial of the appellant, the *Criminal Code Compilation Act* 1913 (WA) provided that an "indictable offence" was triable only on indictment unless that Act, or some other written law, expressly provided otherwise. By s 4 of the lastmentioned Act, it was provided:

> "No person shall be liable *to be tried* or punished in Western Australia as for an indictable offence except under the express provisions of the Code or some other statute law of Western Australia" (emphasis added).

46 As McKechnie J observed[32], the expressly stated provisions of the statute law of Western Australia for the trial of "simple offences" were principally found in the *Justices Act*. Such proceedings are commenced by complaint not indictment. By s 1 of the Code "[t]he term 'indictment' means a written charge preferred against an accused person in order to his trial [sic] before some court other than justices exercising summary jurisdiction".

47 The Code makes exhaustive provision for the procedures governing a trial on indictment[33]. One such provision of the Code is s 594. At the relevant time, it read:

> "... upon an indictment charging a person with an offence he may be convicted of any indictable or simple offence ... which is established by the evidence, and which is an element or would be involved in the commission of the offence charged in the indictment".

48 This provision did not authorise the charging of a simple offence in an indictment. It merely permitted a conviction to be recorded in respect of a simple offence in circumstances where an indictable offence is charged but not proved but the evidence nonetheless establishes the commission of a simple offence and the conduct establishing the simple offence satisfies an element of the indictable offence.

49 In s 602A of the Code, there is a provision which might appear at first blush to provide some support for the regularity of the appellant's conviction on count 2, otherwise reserved, as a simple offence, to the exclusive jurisdiction of a Court of Petty Sessions. This section, since repealed, stated:

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32 [2005] WASCA 1 at [105].

33 The Code, Chs LXII ("Indictments"), LXIII ("Effect of Indictment").

> "A person may be convicted of and punished for an offence on indictment notwithstanding that the person might have been convicted of and punished for that offence summarily."

50 However, as Steytler J[34] and McKechnie J[35] explained, s 602A was inserted into the Code at the same time as a number of provisions enabling certain indictable offences to be dealt with summarily[36]. The purpose of s 602A was to ensure that, despite such provisions, the indictable offences referred to could be tried on indictment. This interpretation is supported by the fact that s 602A appeared in Ch LXIII of the Code which dealt with "Effect of Indictment". It did not appear in Ch LXI titled "Jurisdiction: Preliminary proceedings: Bail" nor in Ch LXIV concerned with "Trial: Adjournment: Pleas: Practice". Furthermore, if s 602A were read to permit the inclusion in an indictment of any offence triable summarily, it would have profound consequences for the continued relevance of the distinction between offences triable summarily and on indictment, a distinction which is observed in the Code. It would also place criminal procedure in Western Australia out of line with that in other Australian jurisdictions. Such a course runs contrary to the principle that, so far as this can be achieved within the statutory language, statutes concerning the criminal law should be interpreted so as to promote uniformity in the criminal law throughout Australia[37] and especially as between Code jurisdictions[38].

51 The final provision that might conceivably have affirmed the inclusion of a simple offence in an indictment was s 622 of the Code. That section, also since repealed, was titled "Trial by jury". It read:

> "If the accused person pleads any plea or pleas other than the plea of guilty, or a plea to the jurisdiction of the court, he is by such plea, without any further form, deemed to have demanded that the issues raised by such plea or pleas shall be tried by a jury, and, subject to [provisions for trial by judge alone], those issues are triable accordingly."

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34 [2005] WASCA 1 at [37]-[38].

35 [2005] WASCA 1 at [110]-[111].

36 *Criminal Code Amendment Act (No 2)* 1987 (WA).

37 *R v Barlow* (1997) 188 CLR 1 at 32; cf *Vallance v The Queen* (1961) 108 CLR 56 at 75-76.

38 *Zecevic v Director of Public Prosecutions (Vict)* (1987) 162 CLR 645 at 665; *Charlie v The Queen* (1999) 199 CLR 387 at 394 [14].

52 Did this provision mean that, on an irregularly joined count of an indictment charging a simple offence, if the accused pleaded not guilty (as the appellant did to both counts) s 622 commanded the jury to try the issues raised by that plea "accordingly", notwithstanding that the offence was a simple offence?

53 This possible interpretation was raised with the parties during the course of argument before this Court. Properly so because, on one view, the fact that an accused had secured a jury trial of a "simple offence" (ordinarily triable summarily in a Court of Petty Sessions only) might be regarded as an advantage to be received with gratitude, not a burden to be complained about.

54 However, such a construction of s 622 was convincingly rejected by McKechnie J. As his Honour stated[39]:

> "It is clear that the reference to 'plea' in s 622 in the context of the *Criminal Code*, can only mean a reference to a plea to an indictment: s 616. A document setting out particulars of a simple offence can never be an indictment, no matter what it purports because it does not set out the provisions for an indictable offence."

55 Before this Court, the prosecution disclaimed any argument for the validation of the indictment in respect of count 2, whether on the basis of s 622, s 602A or any other provision of the Code. In short, the prosecution accepted the analysis of the interconnected provisions of Western Australian law to which McKechnie J referred, and with which the other judges agreed.

56 In these circumstances it is proper for this Court to proceed on the footing that the offence provided in s 59(5) of the *Censorship Act* ought not to have been tried upon an indictment. It belonged exclusively to the jurisdiction of a Court of Petty Sessions. It was not within the jurisdiction of the District Court. The prosecutor's framing of the indictment to include count 2 was legally erroneous. There was no foundation in the law of Western Australia for the appellant to be tried by jury on that count. Still less could he be convicted and sentenced in respect of it.

57 *The 'proviso' in the legislative context*: Given that the prosecution did not contest the correctness of this reasoning, it might appear superfluous for me to have set out the statutory provisions. However, it is not. The 'proviso', governing the disposition of the appeal in the present case, must be given effect in the context of the trial in which the suggested "wrong decision of any question of law" or a "substantial miscarriage of justice" has occurred. Those words only

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39 [2005] WASCA 1 at [120]. See also at [39]-[40] per Steytler J.

derive their meaning and application from their context. In order to understand the appellant's complaint of a relevant "wrong decision of any question of law" and a "substantial miscarriage of justice", it is essential to appreciate the scheme of the Western Australian legislation governing the prosecution respectively of indictable offences and simple offences. Any other approach would ignore part of the statutory context within which the 'proviso' operates.

58 Given that the Parliament of Western Australia has gone to such pains to confine the respective jurisdictions of the District Court and of the Courts of Petty Sessions in the ways I have described, it is clear that the delineation of jurisdiction is not a mere legal trifle. Where Parliament has intended a court, such as the District Court, to have jurisdiction over the trial and punishment of simple offences, it has said so explicitly. Moreover, it has done so with high particularity. Such particularity may sometimes cause inconvenience where a mistake has occurred, as in the present case. But the provisions of the 'proviso' do not lend themselves to overriding obedience by prosecutors and trial courts to the scheme of the enacted law and the particular commands of Parliament which that law carries into effect.

59 From the examination of the legislation, its purpose is therefore clear. Ordinarily, the District Court has no jurisdiction to try simple offences. Where, mistakenly, such offences are included by the prosecution in an indictment, there is no general power in the District Court, or any other court, to correct the mistake and to affirm the unauthorised exercise of jurisdiction. On the face of things, the decision by the prosecutor to proceed on the indictment with a simple offence and the decision of the District Court to try such an offence on indictment were legally invalid. A basic postulate of the parliamentary design has not been observed. In this respect, the person charged on an indictment in such a case has not had a trial as the written law of Western Australia contemplates.

The issues

60 Before this Court, the appellant sought leave to add a ground of appeal not argued in the Court of Criminal Appeal. The question of whether leave should be granted was reserved[40]. In my opinion, the appellant should have such leave, although I agree with the joint reasons[41] that the point fails. The issues in the appeal, taking the added point first, are:

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40 [2006] HCATrans 236 at [22].

41 Joint reasons at [27].

(1) *The nullification of the indictment issue*: Whether the inclusion in the indictment of the second count had the consequence that the entire indictment was a nullity so that it failed to engage the jurisdiction of the District Court at all, rendering the entire trial a nullity and requiring the quashing of the convictions on both counts on this basis, not simply the conviction on count 2?

(2) *The proviso: fundamental error issue*: Whether the inclusion of count 2 in the indictment and the conduct of the trial that then followed was such a "fundamental error" in the procedure of the trial that it went to the "root of the proceedings"? If so, the 'proviso' could have no operation with the consequence that the appellant's conviction on count 1 should also be quashed and a new trial ordered upon that count; and

(3) *The proviso: miscarriage of justice issue*: Whether in the event that the foregoing issues are decided adversely to the appellant, he is nonetheless entitled to succeed on the basis that the inclusion of count 2 in the indictment (and the consequences that this had for the evidence and conduct of the trial that followed) so contaminated the trial on count 1 as to occasion a substantial miscarriage of justice and to require a retrial of count 1 on this basis?

The entire indictment was not a nullity

61 *The appellant's argument*: Steytler J[42] and McKechnie J[43] in the Court of Criminal Appeal spoke of the consequences of the inclusion of a "simple offence" in the indictment, in respect of count 2, as producing a result that was, to that extent, a "nullity". The foundation for this conclusion, in each case, was the opinion that the source of the defect concerning count 2 could be traced to a lack of jurisdiction in the District Court to try the appellant on the offence stated in that count. Because there was no jurisdiction, the proceedings were a nullity and the document setting out the particulars was not, to that extent, an indictment.

62 Both of the judges relied in this respect on an earlier decision of the Court of Criminal Appeal in *Paciente v The Queen*[44]. That also was a case where a second count, not capable of being the subject of an indictment, had been

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42 [2005] WASCA 1 at [45] referring to *Thompson* (1975) 61 Cr App R 108; *Cairns* (1983) 87 Cr App R 287.

43 [2005] WASCA 1 at [120].

44 Unreported, Court of Criminal Appeal (WA), 10 November 1992.

included in the "indictment" with an indictable offence. On that occasion, the Court held that, because the second count alleged a simple offence, and was not capable of being the subject of an indictment, the initiating instrument was a "nullity in respect of that count"[45]. Unsurprisingly, in these proceedings, the Court of Criminal Appeal followed its own earlier authority, using the same language.

63 *Courts and nullities*: The use of the description "nullity" to describe invalid administrative acts (such as the decision of an official or a tribunal made without jurisdiction[46]) presents difficulties given the drastic consequences that can flow from treating an apparently valid official act as if it never occurred. Such problems are greatly magnified when the official act in question is that of a court exercising judicial power. This is especially so where the court in question is a superior court and particularly where the court is (or enjoys the jurisdiction and powers of[47]) a State Supreme Court, having general jurisdiction and powers[48].

64 Once the jurisdiction of a court is validly invoked (as, arguably, the jurisdiction of the District Court was here on the basis of the inclusion of the first count in the indictment), it requires very clear language in the applicable legislation to produce a result that the official acts of the court are thereafter to be treated as "nullities", of no legal consequence[49]. This is an outcome from which courts ordinarily recoil[50]. Certainly, they do so when some other legal classification fulfils the consequence of a conclusion that the law (including a law as to the court's jurisdiction) has not been complied with. Other descriptions, apt to the orders of courts in such circumstances, may be "voidable" or simply "invalid" – so that the court's actions continue to have limited validity (and to

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45 [2005] WASCA 1 at [42].

46 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

47 *District Court of Western Australia Act* 1969 (WA), s 42.

48 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 177 [20], 183-184 [48]-[49], 232 [206]; cf at 221 [173], 268-269 [307]-[308].

49 *Berowra Holdings Pty Ltd v Gordon* [2006] HCA 32 at [87].

50 Cf *Ruddock v Taylor* (2005) 79 ALJR 1534 at 1561-1562 [169]-[174]; 221 ALR 32 at 68-70.

sustain official acts relying on their authority) until another court has set the orders aside[51].

65 I agree with the joint reasons that, in the present case, the District Court had jurisdiction to deal with the offence alleged in count 1. Therefore, to that extent, it had jurisdiction to try the issues presented by the indictment and by the appellant's plea to count 1[52].

66 *Authority supporting partial validity*: A number of overseas cases support the proposition that a misjoinder of summary offences in an indictment can be cured by a court of criminal appeal quashing the conviction on the counts improperly joined. It was so decided in *Callaghan v The Queen*[53] where Watkins LJ in the English Court of Appeal treated the problem as one to be dealt with under s 2(1) of the *Criminal Appeal Act* 1968 (UK) (the 'proviso'). His Lordship applied authority in the Court of Appeal including *Bell*[54], where Lord Lane CJ had observed:

> "In our view it cannot be the law that a perfectly proper indictment containing one count alleging unlawful possession of cannabis resin can be made a complete nullity by the addition of counts contrary to rule 9 [of the Indictment Rules (UK)]".

67 In *Callaghan*, Watkins LJ emphasised that no "prejudice or embarrassment to the appellant" was claimed to result from the Court's conclusion as to the validity of the indictment in respect of the counts properly included in it. This is not a concession made by the appellant in the present case. However, against the proposed added ground of appeal urged for the appellant, the sensible authority of the English Court of Appeal stands in contradiction.

68 That authority was criticised by Professor Smith in a note addressed to the decision in *Callaghan*[55]. He suggested that "the proceedings flowing from the

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51 See *Smith v East Elloe Rural District Council* [1956] AC 736 at 769-770 applied in *Ruddy v Procurator Fiscal, Perth* [2006] UKPC D2 at [55] per Lord Carswell. His Lordship described the concept of nullity as "more than a little elusive, not to say slippery".

52 Joint reasons at [11].

53 (1991) 94 Cr App R 226.

54 (1984) 78 Cr App R 305 at 311. See also *R v Newland* [1988] QB 402; *R v Follett* [1989] QB 338.

55 (1992) *Criminal Law Review* 191 at 192.

arraignment of the appellant upon" an indictment containing a nullity "must surely be a nullity". However, this criticism was rejected in a later decision of the English Court of Appeal in *Smith*[56]. Henry LJ, for the Court, concluded that neither authority nor principle supported the consequence of total invalidation of the proceedings by reason of the inclusion of a count, or counts, that were invalidly joined[57].

69 A somewhat similar conclusion was reached by the Supreme Court of the United States in *United States v Lane*[58], although by the application of different statutory provisions. In that case, a federal District Court had denied pre-trial motions for severance of charged offences said to have been misjoined in violation of the Federal Rules of Criminal Procedure, r 8(b). Following conviction in the subsequent jury trial on all counts, a Court of Appeals reversed the convictions and remanded the proceedings for new trials. It ruled that the misjoinder was prejudicial *per se*.

70 The majority of the Supreme Court of the United States concluded that, in the face of "overwhelming evidence of guilt" the misjoinder had been "harmless". It was therefore subject to the Court's "harmless error analysis" on the basis that appellate relief was reserved to errors involving misjoinder "affecting substantial rights". By this approach, retrials are granted only if the misjoinder results in "actual prejudice" because it "had substantial and injurious effect or influence in determining the jury's verdict"[59].

71 The similarity of the issues, and of the language used, in the legislation and judicial authority concerning the 'proviso' in Australian cases is obvious. The tendency of high appellate courts in England and the United States is to deny the proposition that a misjoinder of counts, which ought lawfully to have been separated, nullifies a trial *per se*. Even in the context of a resulting denial of constitutional rights in the United States, it does not result in nullification of the whole proceeding on the basis that a misjoinder is prejudicial without more. In every case, a more substantive enquiry is enlivened. That enquiry is concerned with any effect that the misjoinder has had on "substantial rights" of the accused and any "substantial and injurious effect" it might have had on the jury's verdict.

72 *Conclusion: nullity not proved*: The two last-mentioned considerations reflect the second and third issues in this appeal to which I will now turn.

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56 [1997] 1 Cr App R 390 at 393-395.

57 [1997] 1 Cr App R 390 at 394-395.

58 474 US 438 (1986).

59 *Kotteakos v United States* 328 US 750 at 776 (1946).

However, for reasons similar to those offered by the English Court of Appeal and by the majority in the Supreme Court of the United States, I would reject the appellant's argument on his added ground. The inclusion in the indictment of a count referring to a "simple offence", triable summarily, was legally erroneous. So much is not now contested. It required the quashing of the conviction that followed the jury's verdict of guilty on count 2. But, of itself, it did not require the invalidation *per se* of the entire indictment or of the proceedings in the District Court which the indictment initiated. To this extent, the order of the Court of Criminal Appeal quashing the conviction on count 2 alone is sustained.

The 'proviso': a fundamental error arose

73 *The appellant's argument*: The appellant submitted that the error that had occurred in the conduct of his trial was to be classified as "fundamental" or going "to the root" of the trial so that the 'proviso' could not apply to rescue the outcome of the remainder of his trial. This submission was based essentially on the scheme of the Western Australian legislation dealing with the trial of indictable and simple offences, providing that simple offences should only be tried in a Court of Petty Sessions and omitting any judicial power to correct a mistaken assignment of jurisdiction where such was proved.

74 The appellant referred to the reasoning of McKechnie J[60], relying on this Court's authority. The point of distinction concerning fundamental errors was made in *Wilde v The Queen*[61], where Brennan, Dawson and Toohey JJ explained:

> "It is one thing to apply the proviso to prevent the administration of the criminal law from being 'plunged into outworn technicality' (the phrase of Barwick CJ in *Driscoll v The Queen*[62]); it is another to uphold a conviction after a proceeding which is fundamentally flawed, merely because the appeal court is of the opinion that on a proper trial the appellant would inevitably have been convicted. The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of that kind may be so radical or fundamental that by their very nature they exclude the application of the proviso."

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60 [2005] WASCA 1 at [128]-[132].

61 (1988) 164 CLR 365 at 373.

62 (1977) 137 CLR 517 at 527.

75 In the recent re-examination of the law on the 'proviso' in *Weiss v The Queen*[63], this Court reserved the application of the 'proviso' to "a serious breach of the presuppositions of the trial". The appellant submitted that what had happened in his trial was such a breach.

76 *Contrary arguments*: The respondent argued that the proper approach to this issue was to consider the acknowledged departure from the law governing a trial on indictment and to evaluate that departure against the overwhelming evidence presented at trial on count 1. Purely formal defects have been held to engage the 'proviso'[64]. This was how the respondent portrayed the error that had occurred in the appellant's trial. It was no more than a mistake in the drafting of the indictment and (as has been found) it did not render the entirety of that document, or the proceeding that followed, a nullity.

77 For the respondent, the mistake was akin to the type of peripheral errors that engaged the 'proviso' as explained by Brennan CJ in *Green v The Queen*[65]. There, his Honour said that the exception for fundamental errors:

> "applies only to fundamental irregularities which demonstrate that no proper trial has taken place. It does not apply when there is no more than an erroneous ruling on the admissibility of evidence or a misdirection on a particular point of fact or law arising in the trial."

78 In *Weiss*[66], this Court pointed out that one of the purposes of the enactment of the 'proviso' in criminal appeal statutes had been to overcome the "Exchequer rule" which had previously prevailed. By that rule[67], as it was understood, the courts generally renounced any discretion to uphold the validity of a trial "where evidence formally objected to … is received by the Judge, and is afterwards thought by the Court to be inadmissible". In such a case, it had been held, the losing party had a *right* to a new trial. The same right appeared where other legal mistakes were demonstrated. This rule was grounded in notions inhering in the qualities attributed to the verdicts of juries in preference to the conclusions of judges.

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63 (2005) 80 ALJR 444 at 455 [46]; 223 ALR 662 at 675.

64 *Mackay v The Queen* (1977) 136 CLR 465 at 470, 472; cf at 473.

65 (1997) 191 CLR 334 at 346-347.

66 (2005) 80 ALJR 444 at 451 [26]; 223 ALR 662 at 669.

67 *Crease v Barrett* (1835) 1 Cr M & R 919 at 933 [149 ER 1353 at 1359]. See *Weiss* (2005) 80 ALJR 444 at 448 [13]; 223 ALR 662 at 665-666.

79 The history, language and purpose of the 'proviso' shows that it was intended to introduce a new approach. It is one by which appellate courts are afforded their own role and legitimacy to examine the substance of the complaint and to judge for themselves, on the record, whether any error requires a retrial of the accused (or in exceptional cases an acquittal).

80 Similar debates have arisen in the United States of America in the context of the jurisprudence on "harmless error". They are reflected in the opinions written in *Lane*[68]. Whilst, in that case, the majority of the Supreme Court upheld the jury's verdicts on the counts improperly joined in the charges against the accused, Brennan J (with the concurrence of Blackmun J) and Stevens J (with the concurrence of Marshall J) reached the opposite conclusion. Those opinions reflect the debates that have occurred in this Court in the present appeal.

81 Thus, in *Lane*, Brennan J, by tracing the statutory developments in the United States, emphasised that reversal should be "limited to prejudicial errors"[69]. He acknowledged that the test for harmless constitutional error was stricter than for its statutory counterpart[70]. He concluded that a misjoinder of charges would not ordinarily rise to the level of having a "substantial influence" on the outcome, even in cases involving a constitutional claim[71]. However, he agreed with Stevens J that an exception arose where the whole of the statutory context showed that the legislation that had been breached was designed to protect "wider values". He did not consider that misjoinder of charges alone fell within this exception[72].

82 The dissenting order of Brennan J in *Lane*, agreeing with Stevens J and supported by Blackmun J and Marshall J, rested on the shared opinion of the minority judges that the harmless error enquiry was normally a task for the intermediate court, not the Supreme Court, given the requirement to examine the entire record thoroughly and the difficulty of discharging that requirement in the final court because of the many demands upon it. Having regard to its other duties, the minority feared that the final court would be bound to perform this important function "perfunctorily"[73].

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68 474 US 438 (1986).

69 474 US 438 at 458 (1986).

70 474 US 438 at 460 (1986).

71 474 US 438 at 461 (1986).

72 474 US 438 at 462 (1986).

73 474 US 438 at 464 (1986).

83 On the other hand, Stevens J, whilst sharing that opinion, was also of the view that harmless error analysis was inappropriate in at least some cases where charges had been invalidly joined and a jury trial conducted on that basis. He said that such exceptions arose[74]:

> "in at least three situations: (1) when it is clear that a statute or Rule was not intended to be subject to such a rule; (2) when an independent value besides reliability of the outcome suggests that such analysis is inappropriate; and (3) when the harmlessness of an error cannot be measured with precision".

84 In the opinion of Stevens J, misjoinder of a charge in the proceedings "clearly falls" into the first category. Partly this was so because of the "deep abhorrence" of the law to the notion of "guilt by association". It was, in effect, part of the law's highly specific approach to criminal charges[75]. The source of the rule forbidding the joinder of charges appeared in a separate statutory provision. That provision was one which the legislature intended to be observed.

85 *Conclusion: a basic error*: I accept that different conclusions are available on this issue. The nature of the controversy and the breadth of the language of the 'proviso' virtually assures the existence of differences of judicial views. Such differences may reflect the diverse values that judges accord to considerations of principle and pragmatism, as they regard them. Those differences appear in many cases in this Court concerned with the 'proviso'[76]. They are also reflected in the foregoing differences of opinion in the United States Supreme Court.

86 I leave aside, in this case, any considerations derived from international human rights law[77]. I pass by the defects of a trial on the record, for mistake at the trial is the very presumption inherent in the application of the 'proviso' by an appellate court[78]. Additionally, that consideration is of less significance in this

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74 474 US 438 at 474 (1986) (footnotes omitted).

75 See in Australia *R v De Simoni* (1981) 147 CLR 383 at 389, 395; cf *MacKenzie v The Queen* (1996) 190 CLR 348 at 367.

76 See, eg, *Green v The Queen* (1971) 126 CLR 28 at 31; *Jones v The Queen* (1997) 191 CLR 439; *Darkan v The Queen* [2006] HCA 34.

77 See *Darkan* [2006] HCA 34 at [139] referring to Art 14.2 of the International Covenant on Civil and Political Rights.

78 *Darkan* [2006] HCA 34 at [143] referring to *Weiss* (2005) 80 ALJR 444 at 454 [39]; 223 ALR 662 at 673.

case because of the admissions made for the appellant at the trial of count 1 and the narrow focus of the resulting contest.

87 The critical consideration on this issue is only appreciated when the detailed Western Australian legislation on criminal procedure is fully understood. That is why I have set it out above. When that is done, it can be seen that the bifurcation of indictable and simple offences, incapable of explicit repair in case of a mistake, was a deliberate policy stated in the written law made by the Parliament of Western Australia. In the face of such particularity in the enacted law, I am unconvinced that the general language of the 'proviso', read in its context, authorises a judge to treat a breach of the written law as immaterial or simply to be repaired by invoking the 'proviso'. In effect, I agree with the approach of Stevens J in *Lane*[79]:

> "The harmfulness of misjoinder is … the type of error that has consequences that are difficult to measure with precision. These concerns may or may not outweigh the societal interests that motivate the Court today, but they are surely strong enough to demonstrate that the draftsmen of the Federal Rules acted responsibly when they adhered to the time-honored rule [on misjoinder]. The misjoinder Rule that they crafted is clear, and should be respected. Misjoinder affects 'substantial rights', and should lead to reversal."

88 By parity of reasoning, the misjoinder of count 2 in the prosecution indictment of the appellant did not render that indictment, or the proceedings it put in train, a complete nullity. But it was contrary to the express law of Western Australia and, so far as count 2 was concerned, could not be cured by consent or by judicial authorisation. In such circumstances this Court should give effect to the language and purpose of the specific statute law of Western Australia on that subject and treat it as fundamental (as matters of jurisdiction commonly are). The appellant was completely innocent of any part in the error that occurred. The decisions to present the defective indictment, and to proceed with the trial upon it, were decisions of officials acting for the State. The case is an important one for the appellant and for the community. The appellant and the community are entitled to have a retrial that conforms to the written law and has no jurisdictional flaw involving the inclusion of an extraneous non-indictable accusation[80].

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79 474 US 438 at 475 (1986) (footnotes omitted).

80 *Truong v The Queen* (2004) 78 ALJR 473 at 510 [154]; 205 ALR 72 at 110; *Fingleton v The Queen* (2005) 79 ALJR 1250 at 1281 [157]; 216 ALR 474 at 515-516.

The 'proviso': substantial miscarriage of justice is shown

89 *The appellant's argument*: This conclusion is sufficient to support an order allowing this appeal. However, in the Court of Criminal Appeal, McKechnie J offered a second reason for such an order. This was that, apart from undermining the basic postulate of a lawful trial, the inclusion of count 2 in the indictment and the subsequent trial upon it occasioned a substantial miscarriage of justice to the appellant by permitting the intrusion of extraneous information, in the form of an invalid criminal accusation, evidence and directions that had nothing to do with the proper trial on count 1. Such information *might* have influenced the jury's verdict on that count[81].

90 Explaining his conclusion on this point, McKechnie J said[82]:

> "The essence of the prosecution case was that the applicant was in possession of prohibited material, some of which was child pornography and some of which was obscene and indecent material. There is no necessary causal link in the chain of reasoning which required the prosecution to lead evidence of the possession of obscene and indecent material to sustain proof on count 1. It may be that the evidence would be admissible but the applicant was denied the opportunity of advancing an argument to the contrary by reason of the joinder of counts 1 and 2."

91 *Contrary arguments*: The arguments against this proposition are expressed in the joint reasons[83]. They include the narrowness of the issue upon which the jury were ultimately required to focus by reason of the admission made for the appellant at trial (effectively the "possession" issue); the evidence of admissions relevant to that issue allegedly made by the appellant at the time of the initial interview; the difficulties for the theory of an alternative offender (a hacker) because of the coincidence of the appellant's visits to the computer laboratory and the timing of the downloading of the images; the suggested arguability of the relevance of the material the subject of count 2 to proof of the offence in count 1; and the affirmative need which the appellant might have felt to prove the receipt of at least one of the images referred to in count 2 in order to establish the downloading of such images *after* the time that he alleged his own access to the computer facility was disengaged.

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81 [2005] WASCA 1 at [133]. See also *Conway v The Queen* (2002) 209 CLR 203 at 241 [102].

82 [2005] WASCA 1 at [133].

83 Joint reasons at [24]-[30].

92 I give due weight to each of these arguments. On the other hand, the appellant's trial was affected by the inclusion in it of a separate and different criminal accusation concerned with the possession of indecent or obscene articles, repeatedly described in the trial as relating to acts of "bestiality" (which in law ordinarily means the offence of sexual penetration by or of an animal[84]).

93 It is true that the admission, made at the outset of the trial (to the effect that the images in the articles relevant to the second count were "indecent or obscene") obviated the jury's examination of the actual material (with the additional prejudice that might have entailed). Nevertheless, the record of the trial is repeatedly interrupted with reminders before the jury that the appellant was facing two counts not one, the second of which involved articles including images of "bestiality". This was referred to in the examination of Mr Bradley Frazer, a fellow student and friend of the appellant. It was repeatedly referred to in the examination of Detective Thomas. It was explained in the closing address by the appellant's trial counsel in describing the evidence relating to the second count. It was referred to, and explained briefly, in the trial judge's summing up. True, the mentions were confined. However, they were unlikely to have been forgotten by the jury. "Bestiality" is an unusual and vivid word, rare in everyday speech. The appellant was tarred with the accusation that necessitated repeated reference to it in his trial. In the minds of the jury, the references doubtless would have conjured at least some notion of sexual activity with animals which some of the jurors may have found especially disgusting.

94 In an age when indecent or obscene materials are available in Australia in large quantities and great varieties, it might be expected that the jury would treat the accusation of possessing "bestiality" images with worldly commonsense. But they might not have done so. It was difficult enough for the appellant to contest the charge concerning child pornography in the first count without adding to his burdens (invalidly as it turns out) another accusation involving images of "bestiality". Because we cannot know the way that the jury reasoned to their conclusion (and because they were instructed by the trial judge to consider count 2 separately and to reach a unanimous conclusion on that count), it is possible that the inclusion of reference to the "bestiality" images excited antagonistic feelings on the part of at least some jurors[85].

95 Of course, the jury may have treated the "bestiality" images as relatively harmless, a view which the Parliament of Western Australia appears to have

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84 Cf *Bourne* (1952) 36 Cr App R 125.

85 Cf *Domican v The Queen* (1992) 173 CLR 555 at 565-566; *Festa v The Queen* (2001) 208 CLR 593 at 654-655 [202]-[204]; *Darkan* [2006] HCA 34 at [157]-[158].

taken by reducing the penalty for possession of such indecent or obscene articles, doubtless in response to contemporary social realities[86]. On the other hand, there are 10 categories of images that are reportedly used as part of the sexual repertoire of persons with a sexual interest in children[87]. The categories were developed by the COPINE Centre in Europe. Similar classifications have been accepted in England in *Oliver's* case[88]. The categories of child pornography developed by the English Court of Appeal and by COPINE range from "nudist" to the most serious category, described as "sadistic/bestiality". This is COPINE Category No 10 out of 10 or Category No 5 out of 5 of the English Court of Appeal. In each case it is the *most* serious category.

96 Depending on the actual images in the particular case, it cannot be said that "bestiality" images are universally regarded as trivial or insignificant. At least in conjunction with child pornography, they may be viewed as very serious indeed. For all that this Court knows, the jury (or members of it) might have taken a grave view of the subject. If Scalia J in the Supreme Court of the United States in *Lawrence v Texas*[89] could include "bestiality" by name amongst a catalogue of evils deserving community denunciation and justifying proscriptive legislation on the grounds of morality, we in this Court can hardly deny the possibility that some Australian jurors might share the same opinion. The impermissible inclusion of the second count in the indictment deprived the appellant of a trial that was free from any reference to this extraneous factor. It deprived him of the chance of avoiding this added complication in his trial. Specifically, it deprived him of the forensic choices that the separate trial of the offences referred to in the two counts would have entailed.

97 Trials of offences of possessing child pornography are sensitive and difficult because they occur in a society concerned about child abuse but flooded with erotic images[90]. The response of individual jurors to accusations of the possession of images of "bestiality" is particularly hard for appellate judges to

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86 See joint reasons at [4] referring to *Censorship Amendment Act* 2003 (WA), s 41(1).

87 Krone, "Issues facing judges in sentencing online child pornography offenders", (2006) 18 *Judicial Officers' Bulletin* 25 at 26-28.

88 *Oliver* [2003] 1 Cr App R 28 at 466-467 [10].

89 539 US 558 at 590 (2003).

90 Howitt, "Pornography and the paedophile: Is it criminogenic?", (1995) 68 *British Journal of Medical Psychology* 15; Marshall, "The Use of Sexually Explicit Stimuli by Rapists, Child Molesters, and Nonoffenders", (1988) 25 *Journal of Sex Research* 267.

assess and predict. The risk of a substantial miscarriage of justice from such contamination is not negligible.

98 *Conclusion: a substantial miscarriage shown*: I therefore conclude on this issue in the same way as McKechnie J did in the Court of Criminal Appeal. The appellant was legally entitled to have the count alleging possession of child pornography decided by the jury without any immaterial reference to a criminal accusation of possessing other images, including images of bestiality.

99 With all respect to those of the contrary view, I do not believe that the prosecution, in a trial limited to possession of child pornography, would attempt to prejudice the jury by including evidence of an extraneous and different form of material including of bestiality. The care taken in this trial to avoid showing the jury the actual images indicates the correct approach, which the prosecution observed.

100 Nor do I consider that the tender of such material would have been permitted in a trial if that trial had been limited to the indictable offence of possession of child pornography. A judge guarding the fairness of the conduct of such a trial would be properly careful to restrict extraneous, and possibly prejudicial, evidence. By impermissibly charging the two offences in the one indictment, an inter-mixture necessarily occurred. Descriptions or conceptions of the contents of the images became inevitable. It is that inter-mixture, before the jury, that presents the risk of a substantial miscarriage of justice. It is that risk that withholds the application of the 'proviso'.

101 This is not a case where the trial judge was able to correct the error of law at the trial by giving accurate instructions to the jury[91]. On the contrary, the impermissible misjoinder was not noticed until after the trial. Consequently, the trial judge gave the jury directions on the legal requirements of the second count. He received their verdict on that count. And he proceeded to enter a conviction on that basis which, it is common ground, was legally invalid.

Conclusion and orders

102 The offence of which the appellant has been convicted is a very serious one for him, a young man who convinced the trial judge that he was not motivated by paedophilic designs[92]. To carry the burden of such a conviction in life demands a trial freed of the errors that occurred here. The trial was

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91 *Nudd v The Queen* (2006) 80 ALJR 614 at 637 [110]; 225 ALR 161 at 189-190.

92 Remarks on sentencing of Muller DCJ, *R v Bounds*, unreported, District Court of Western Australia, 15 July 2003 at 215.

fundamentally flawed by the impermissible inclusion of an irrelevant and legally inadmissible criminal accusation. The trial also involved a substantial miscarriage of justice because such inclusion permitted contamination of the evidentiary considerations before the jury by a factor that might have prejudiced the appellant. Ultimately, my conclusion is that stated by Gleeson CJ, and given effect by this Court, in *Antoun v The Queen*[93]: "Strong as the case against the [appellant] may be, [he was] entitled to a fair hearing."

103 The appeal should be allowed. The judgment of the Supreme Court of Western Australia (Court of Criminal Appeal) should be set aside. In place of that judgment it should be ordered that the appeal to that Court be allowed; the appellant's conviction quashed; and a new trial ordered.

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93 (2006) 80 ALJR 497 at 503 [23]; 224 ALR 51 at 57.